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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; AND OTHERS,

Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C&R. TRANS., INC.; AND OTHERS,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

STATEMENT AS TO JURISDICTION

JOSEPH H. HAZE
AMOS M. MATHEWS
230 Union Station Building
Chicago 6, Illinois
Attorneys for Appellants

A. L. SCHOONMAKER
JAMES W. NEBERT
CARL HELSTERN, JR.
EUGENE E. ANDERSON, JR.
J. RAYMOND CLARK
Of Counsel for Appellants

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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In compliance with paragraph 2 of Rule 13 appellants submit the following statement as to jurisdiction.

OPINION AND JUDGMENT BELOW

The opinion of the District Court is reported in 130 F. Supp. 76. A copy is attached as Appendix A at page 20 hereof.

The final judgment of the District Court dismissing this cause, from which this appeal is taken, is not reported. A copy is attached as Appendix B at page 25 hereof.

The report and order of the Interstate Commerce Commission which is the subject of this action is published in 60 M. C. C. 173. A copy is attached to the complaint.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This is an action by appellants to enjoin and set aside an order of the Interstate Commerce Commission, pursuant to 28 U.S.C. sections 1336, 2284, and 2321 to 2325.

The final judgment of the District Court sought to be reviewed was dated and entered April 11, 1955. Appellants served a motion for new trial and to set aside judgment April 19, 1955, and filed it April 20, 1955. The motion was overruled by the District Court by order dated and entered June 7, 1955. Appellants' Notice of Appeal was filed July 28, 1955, in the office of the Clerk of the District Court of the United States for the Eastern District of Missouri, Eastern Division.

Jurisdiction of this appeal is conferred by 28 U.S.C. section 1253.

Many cases sustain jurisdiction; for example, *Alton Railroad Company* v. *United States*, 315 U.S. 15; *Baltimore & Ohio Railroad Co.* v. *United States*, 264 U.S. 258; *United States* v. *Marshall Transport Co.*, 322 U. S. 31.

THE QUESTION PRESENTED BY THE APPEAL

All of the defendants except the United States and the Interstate Commerce Commission filed motions to dismiss on the ground that the complaint "shows that plaintiffs are not parties in interest, and, therefore, have no standing to maintain this action." The United States and the Commission each filed an answer setting up this ground as a separate defense. The final judgment of the District Cour

recited (p. 25 hereof): "* * * it is hereby ordered that said motions be sustained and the cause dismissed on the ground that plaintiffs are not parties in interest who may maintain this suit." The Court's opinion (p. 24 hereof) stated only the same single ground as reason for dismissal. The question presented is whether the District Court erred in entering its judgment dismissing the cause on the ground so stated.

STATEMENT OF THE CASE

Appellants' principal ground of attack upon the Commission's order is the following, as stated in the complaint.[1] In a motor carrier acquisition proceeding under section 5(2) of the Interstate Commerce Act, 49 U.S.C. section 5(2), to which appellee Fruehauf Trailer Company was *not* a party, the Commission nevertheless authorized Fruehauf to acquire control of several large motor carriers. Appellants allege that the Commission's order is void for lack of jurisdiction in that Fruehauf, although indispensable for jurisdiction, was not a party to the proceeding. Commissioners Mahaffie and Johnson dissented from the order on the ground that "Fruehauf Trailer Company will be one of the persons in control of these carriers as control is defined in the Act" and that Fruehauf was therefore an indispensable party to the proceeding. (complaint par. 9; 60 M.C.C. p. 206).

Appellants further allege (complaint par. 17) that the

1. A copy of appellants' complaint is attached hereto, page 26, as Appendix C, except that the report of the Commission, being voluminous, is not included in such copy although it is attached to the original complaint as exhibit A. The report is published in 60 M.C.C. 173. The summary of the complaint set forth in the District Court's opinion is incomplete in that it omits many of the important allegations of fact contained in the complaint.

Commission's order, in violation of section 5(2), permits Fruehauf to control several large motor carriers without becoming subject to Part II of the Act, 49 U.S.C. 301 *et seq.*, and that the order would permit Fruehauf to acquire control of any number of additional motor carriers without becoming subject to Part II and thereby would permit Fruehauf to obtain a motor carrier monopoly in violation of section 5(2).

Appellants further allege (complaint par. 20) that they are common carriers by railroad engaged in transportation of freight for hire as originating, intermediate, or terminating carriers throughout the areas served by all of the motor carriers involved, that appellants serve all points in such areas, that they are competitors of such motor carriers in such areas in the transportation of freight, that they have a direct interest in the enforcement of section 5 of the Act to the end that no consolidation or joinder under common control of two or more motor carriers should be permitted otherwise than in conformity with section 5, that the National Transportation Policy and the Interstate Commerce Act require that competition between appellants and the aforesaid motor carriers be regulated and carried on in conformity with the Policy and the Act including section 5, and that appellants have a direct interest in the enforcement of the National Transportation Policy and the Act to that end.

The following is a further summary of the allegations of the complaint.

The Commission's order was entered under the following circumstances. C.&R. Trans., Inc., John Ruan as C.&R.'s sole stockholder, and the trustees in bankruptcy of four motor carriers hereinafter called the Keeshin companies, filed a joint application under section 5(2) of the Inter-

state Commerce Act, 49 U.S.C. 5(2), asking the Commission to authorize Ruan and C.&R., to acquire control of the Keeshin companies. (complaint par. 6). Appellants intervened in opposition to the application. After a hearing the Commission, Division 4, denied the application. One ground for the denial was that Fruehauf Trailer Company would provide most of the financing for the proposed transaction but was not a party applicant. (complaint par. 7). (The report of Division 4 is published in 60 M.C.C. 5).

Thereafter the original applicants filed a petition for reconsideration and further hearing. At the same time Fruehauf filed an application to be made a party applicant and a petition to be dismissed as a party applicant. On reconsideration and further hearing the Commission approved the proposed transaction and granted Fruehauf's petition to be dismissed as a party applicant. (complaint pars. 8, 9).

Commissioners Mahaffie and Johnson, dissenting, said in part (60 M. C. C. pp. 205-206; Exhibit A attached to complaint):

> "I do not agree that the application of Fruehauf Trailer Company to acquire control of these properties can properly be dismissed. * * * The report makes it very clear that Fruehauf and Ruan in this transaction are 'two or more persons acting together, one of whom is a carrier or is affiliated with a carrier.' Freuhauf is a large creditor of Keeshin. It has provided funds to keep Keeshin in operation. It is furnishing most of the money and credit necessary to reorganize and rehabilitate the Keeshin properties. Fruehauf has arranged the reorganization and has interested Ruan to take part in it both personally and through one of his presently controlled motor carriers."

The Commission itself expressed uneasiness about its order, saying (complaint par. 17; 60 M.C.C. p. 200):

"It is apparent that Ruan and Fruehauf have worked together in formulating this transaction. Without the financing of Fruehauf, the plan would not be possible. We are also not unaware of the power and influence which a substantial creditor and preferred stockholder, especially one engaged in a business so closely connected with transportation, can wield over the management of a carrier. The situation here has been further complicated by the acquisition by Fruehauf and its representatives of considerable power in the control of Denver Chicago Trucking. Controlled or managed in a common interest, this carrier and the Keeshin system would span the continent and blanket the industrial area north of the Ohio and east of the Mississippi Rivers. This record fails to contain evidence adequate to support a finding that such control or management in a common interest would be consistent with the public interest; nor, in our opinion, was the presence of this question in the case known prior to the further hearing."

Ruan and his family control through stock ownership two corporations, not heretofore referred to, Ruan Transport Corporation and Ruan Transport, which hold authority under Part II of the Act as motor common carriers to transport petroleum products in bulk in interstate commerce, over irregular routes in Illinois, Minnesota, Missouri, Nebraska, and Wisconsin. In 1953 these companies had gross operating revenues of about $6,300,000 and operated 500 units of motor vehicle equipment approximately 18,000,000 miles. (complaint par. 10).

The Keeshin Companies have authority under Part II of the Act to operate as motor common carriers of general commodities over a network of connected regular routes in Missouri, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, Maryland, New Jersey, West

Virginia, and the District of Columbia, serving the principal points in most of such states. They are operated as a single system. In 1953 the Keeshin companies had gross operating revenues of $13,577,160 and a deficit of $986,292. (complaint par. 11).

Fruehauf Trailer Company is engaged, among other things, in the manufacture, sale, and distribution of truck-trailers and truck-bodies. It and its domestic subsidiaries have 8500 employees. It operates eight manufacturing plants in the United States, and operates manufacturing subsidiaries in Canada, France, and Brazil. Its products are sold through 74 company owned sales and service branches. It produces about forty per cent of the freight carrying trailers manufactured in the United States and had net sales in 1953 of $184,590,432. (complaint, par. 12).

Fruehauf has control of Detroit & Cleveland Navigation Company, which owns 37 per cent of the common stock of Denver-Chicago Trucking Company. The latter holds authority to operate as a motor common carrier of general commodities over regular routes between New York and Boston on the east and the largest Pacific coast points on the west and the principal large cities intermediate thereto. (complaint pars. 13, 14).

In order to consummate the proposed transaction the following financial commitments have been made. Ruan and one of his companies would invest $300,000 in cash, consisting of a contribution of $100,000 to the unearned surplus fund of Keeshin Freight Lines, Inc. one of the Keeshin companies, and purchase of $200,000 of preferred stock to be issued by Keeshin Freight Lines, Inc. Fruehauf would guarantee payment of unsecured promissory notes of Keeshin Motor Express Co., Inc., one of the Keeshin companies, in the principal amount of $1,200,000. Fruehauf would also make a direct unsecured loan to Keeshin Motor

Express Co., Inc., of $400,000. Fruehauf would purchase $500,000 of preferred stock to be issued by Keeshin Freight Lines, Inc. Fruehauf has paid $265,000 for certain 3½ per cent notes of Keeshin Freight Lines, Inc., and upon approval of the proposed transaction would surrender them to the maker for cancellation. Fruehauf's subsidiary, Fruehauf Trailer Company of Canada, Ltd., made on unsecured loan of $53,296 to C.&R. for purchase of the common stock of Keeshin Freight Lines, Inc. (complaint, par. 15).

An officer of Fruehauf devoted all of his time from January, 1954, to April 20, 1954 (the date of the further hearing), in trying to work out a plan of reorganization of the Keeshin Companies, and during that time worked in close contact with John Ruan and his associates. If the proposed transaction were approved part of the duties of such officer as an officer of Fruehauf would be "keeping an eye upon the operations and management of the new company." Fruehauf would take whatever steps might be available to it under the proposed transaction for the protection of Fruehauf's interests whenever action might be necessary. After approval of the transaction was denied by Division 4 of the Commission on January 29, 1954, Ruan wanted to abandon the project but was persuaded by Fruehauf to file the application for reconsideration and further hearing. Ruan and his motor carrier companies described in paragraph 10 owe substantial sums to Fruehauf on outstanding motor vehicle equipment obligations. Ruan is the sole owner of Ruan Equipment Co., a non-carrier, which owns 250 tractors which it leases to Fruehauf for long terms without drivers. These tractors are used by Fruehauf to effect delivery of trailers to purchasers. Leasing these tractors to Fruehauf and servicing them is the sole business of Ruan Equipment Co. Ruan owns 200 shares of stock of Fruehauf. If the proposed transaction is consummated

Ruan or his company will purchase 200 trailers from Fruehauf. (complaint, par. 16).

THE QUESTION PRESENTED IS SUBSTANTIAL

The complaint alleges facts which establish that the Commission's order is void for want of jurisdiction under *United States* v. *Marshall Transport Co.*, 322 U.S. 31. The complaint further alleges facts showing that appellants are in competition with the several motor carriers which, by the Commission's void order, are placed under common control in violation of section 5 of the Act. And the complaint further alleges facts showing that such motor carriers are under the control of Fruehauf Trailer Company which, by such order, is excused from regulation under Part II of the Act, this being likewise in violation of section 5.

Nevertheless, the District Court held that appellants "are not parties in interest who may maintain this suit" to enjoin and set aside the order. It is submitted that this was error. It is further submitted that the question thus presented is a very substantial one in the administration of the Interstate Commerce Act, is a very substantial question to the railroads in competition with motor carriers, and requires plenary consideration, with briefs on the merits and oral argument, for its resolution.

In *Baltimore & Ohio Railroad Co.* v. *United States*, 264 U.S. 258, the Court held that an order of the Commission made under section 5(2) was reviewable before a district court of three judges. (pp. 263-266). The Court also held that railroads competing with the railroads on whose behalf the order was entered had standing to bring the action. (pp. 266-269). The Court pointed out (p. 267) that prior to the enactment of section 5(2) in 1920 the plaintiffs to the suit would have had no recourse, but that section 5(2) had created rights that could be enforced in court. And the

Court held that a statute that was designed to change the conditions of competition among railroads gave to a railroad the right to demand of the Commission and the courts that the operations of its competitors be conducted in accordance with section 5(2). The bases of standing to sue were the provisions of section 5(2) and the fact of competitive status between the plaintiff railroads and the private defendants. There was a dissenting opinion (p. 271) which is of interest because it expressed in substantial measure the reasoning of the District Court in the instant case.

In *Alton Railroad Co.* v. *United States*, 315 U.S. 15, the Court held very broadly that existence of competition between railroads and a motor carrier gave the railroads the status of "party in interest" to obtain review in court of orders of the Commission affecting the motor carrier. The Court said (pp. 18-19):

> "We are met at the outset with the question of the standing of the appellant railroad companies (seventy-one in number) to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve. They rest their right to sue on § 205(h) of the Motor Carrier Act[2] (49 U.S.C. Supp. § 305(h) which provides that 'Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . .'"
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> "They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for auto-

2. Now § 205(g) of Part II of the Interstate Commerce Act. 54 Stat. 922; 49 U.S.C. § 305(g).

mobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of § 205(h) * * *."

The factual situation in the *Alton* case in respect to existence of competition was precisely the same as that presented by the instant case. The evidence in the *Alton* case was that the plaintiff railroads were engaged in transporting automobiles to points in the states served by Fleming, the motor carrier. That was all. There was no evidence and no allegation that Fleming actually had taken traffic away from the railroads or would do so in the future.

In the instant case the complaint alleges (par. 20) that the plaintiff railroads serve in the transportation of freight all of the points in the areas served by the involved motor carriers and that the plaintiffs are competitors of those motor carriers in the transportation of freight in such areas.

In the *Alton* case (315 U.S. 15) the Court recognized the fact that railroads and motor carriers serving the same points are in competition and do take traffic from each other, citing the record of that intense competition in the legislative history of Part II of the Interstate Commerce Act, 49 U. S. C. 301 *et seq.* One of the best established and most important facts of common knowledge in transportation is the strong competitive rivalry between railroads and motor carriers; it dominates all other questions before

the Interstate Commerce Commission and pervades every facet of regulation.[1] This Court clearly recognized the fact of that competition as the basis of the "party in interest" status, and the Commission has recognized the importance of that competition in recurring references to it in its annual reports. It assuredly would be a wholly unrealistic approach to regulation to say that one party to that competition is not a "party in interest" in the statutory plan set up by Congress to regulate the competition between them.

It is to be kept in mind that while the *Alton* case refers to the statute giving standing to sue to a party in interest, the fundamental quest in that case was to determine whether the railroads qualified as "party in interest" within the meaning of the statute. And the railroads met that test simply because they served the same states that the motor carrier served. The central holding of the *Alton* case is that service to the same points, a fact presumptive of competition, establishes a status of "party in interest" to main-

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1. 52nd Annual Report of the Interstate Commerce Commission, 1938, p. 17: "* * we regard the extraordinary increase in transportation competition as a primary cause of railroad ills."

54th Annual Report of the Commission, 1940, p. 27: "Motor carriers * * are strong competitors of the railways."

67th Annual Report of the Commission, 1953, p. 3: "The intense competition in which the several modes of transportation engage and the continuing and difficult problems it presents to us have been discussed in several recent reports. There has been no abatement of the intensity of this competition in the current year. It shows itself principally in rate maneuvers, some of which are carried to great extremes. It also appears in the form of railroad objections to grants of operating rights and at times to proposed unifications of motor carrier properties."

tain an action in court for review of an order of the Commission.

The order in this case does affect competitive relations. This case is actually stronger in that respect than the *Alton* case. In the *Alton* case the motor carrier had been serving the areas in question since 1933. After the enactment of Part II of the Interstate Commerce Act in 1935 he applied to the Commission for authority under the "grandfather" clause to continue those operations. The only question of fact before the Commission and the courts was whether he had made a sufficient showing of past operations to warrant authorization of their continuance. He was entitled under the Act to receive authorization to continue only the transportation service in which he was engaged in bona fide operation on and since June 1, 1935.

Thus the question of law in the *Alton* case was whether the Commission was empowered under the applicable statute to authorize existing motor carrier operations to be continued. This Court held that the railroads had standing to contest in court the right of the motor carrier under the statute to continue the same operations which he had been conducting for several years.

In the instant case there is a great deal more than that. The Commission has authorized the continuance of certain existing motor carrier operations, but it has made very substantial changes in the manner of their continuance. It has authorized in violation of section 5 a far more extensive and powerful unification of carriers in common control than previously existed.

Appellants are objecting to the joinder under common control of the two Ruan motor carriers (complaint par. 10) and the four Keeshin motor carriers (complaint par. 11) in violation of section 5. Appellants are objecting that

Fruehauf, although one of the persons in control of those carriers, or some of them, and therefore an indispensable party to the acquisition proceeding, was dismissed as a party on its own motion. Appellants allege facts showing that they face the competition of a combination of motor carriers which is unlawful under section 5 and that one of the persons in control of such combination, Fruehauf, is by the Commission's order unlawfully excused from being subject to the Interstate Commerce Act. On these facts appellants assuredly have cause to complain against the competition of an illegal combination of motor carriers brought about solely by the promotion of Fruehauf (complaint par. 16), revitalized by a large outpouring of Fruehauf money (complaint par. 15), and subject on Fruehauf's own statement to Fruehauf's continuing supervision (complaint par. 16).

The Commission itself held, over specific objection by motor carriers, that in a motor carrier acquisition proceeding under section 5 railroads were parties in interest. In *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*, 57 M.C.C. 341, the Commission denied the application for unification of two large motor carriers. Petitions for reconsideration were filed by the affected motor carriers and by American Trucking Associations, Inc., urging that the railroads were not entitled to consideration in the case. Overruling this contention the Commission on reconsideration said (57 M.C.C. 467, 471-472):

> "The evidence presented by the railroad protestants is set out and discussed in some detail in the prior report. Although it does not establish the actual or probable loss which any individual railroad might sustain from the proposed unified operations, it does disclose the trends during recent years, unfavorable to the railroads, in the distribution of traffic and revenue as

between rail and highway carriers and the importance to the railroads of the higher-rated traffic. The railroads have good reason to be concerned over the diversion of such traffic from their lines. The statement in the prior report that transcontinental traffic can be transported more economically by rail than by motor carrier is expressly limited to traffic moving in large volume and is supported by the record. The evidence presented by grain exchanges and by shippers of building materials, cement, coal, and various other commodities shows that they, too, are concerned about the diversion of higher-rated traffic from the rail lines. This evidence as well as the evidence presented by the protesting railroads is relevant and material and must be considered by us in arriving at the findings required by section 5 of the act."

In addition to the foregoing considerations, if this order is allowed to stand the way is open to Fruehauf to acquire control of whatever number of other motor carriers it fancies, in the same manner and without compliance with section 5. The Commission had no administrative discretion under the facts of this case; it was required as a matter of law and jurisdiction to decide whether Fruehauf was or was not a necessary party. It chose the latter position. The same decision would be required in any other case of the same character. For if the Commission has the power to relinquish jurisdiction of Fruehauf in this case, it lacks the power to assert jurisdiction in any similar case.

And the intention of Fruehauf to control motor carriers in its own interest and without application to the Commission is revealed by its acquisition of control of Denver-Chicago Trucking Company between the date of the report of Division 4 in this proceeding, January 29, 1954, 60 M.C.C. 5, and the date of the report of the Commission, June 7, 1954, 60 M. C. C. 173. See complaint, pars. 13, 14,

and 17, and the Commission's report attached to the complaint, 60 M. C. C. 173. The report sets out many details (pp. 177-178) showing that Fruehauf actively sought and gained control of Denver-Chicago as control is defined in section 5.

Fruehauf's acquisition of control of Denver-Chicago furnishes cumulative evidence of the illegality of the Commission's order. Without consideration of Fruehauf's course in respect to Denver-Chicago, the order is clearly void under *United States* v. *Marshall Transport Co., supra*, 322 U. S. 31. But the Denver-Chicago situation not only brings into this case control of another carrier by Fruehauf as an additional violation of the jurisdictional requirements of section 5; it leaves a record in this case that, in the words of the Commission (60 M. C. C. p. 200), "fails to contain evidence adequate to support a finding that such control or management in a common interest would be consistent with the public interest."

THE NATIONAL TRANSPORTATION POLICY

In addition to the matters above stated, the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding pars. 1, 301, 901, and 1001, enacted as a part of the Transportation Act of 1940, makes it independently and cumulatively clear that appellants are parties in interest entitled to maintain this action. In a series of cases construing the Policy this Court has emphasized that great care must be exercised by the Commission and the courts in dealing with and adjusting the competitive relationships of the different types of transportation, rail, motor, and water carriers, with each other in accordance with the Policy. See *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 616-618; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66-68, 73; *American Trucking Associations* v. *United States*,

326 U. S. 77, 86-87; and *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 205-207. Carriers of one mode of transportation have been permitted to litigate in court the validity of authority granted to another type in a wide variety of circumstances. Assuredly it is not consistent with the policy to say in the instant case that the appellants, competing with certain motor carriers, and being faced with an issue as vital as this, have no standing as parties in interest to challenge a combination of such motor carriers which is unlawful under section 5.

Since 1920 there have been very substantial changes in the statutes regulating carriers. Before 1920 regulation consisted largely of adjustment of the conflicting interests of shippers and railroads. In the past thirty-five years the trend of legislation has been toward strengthening the carrier industry in general and maintenance of the vigor of each mode of transportation by elaborate regulation of the competition among the different modes. Witness the Transportation Act of 1920, 41 Stat. 590; in 1935, Part II of the Interstate Commerce Act, 49 Stat. 543, 49 U.S.C. 301; in 1940, Part III of the Act, 54 Stat. 929, 49 U.S.C. 901; and in 1940 the National Transportation Policy. See *Alton Railroad Co.* v. *United States, supra,* 315 U. S. 15, 19-20, and cases above cited in the discussion of the National Transportation Policy. And see Regulation of Transportation Agencies, Senate Document No. 152, 73rd Cong., 2nd Sess., pp. 95-97.

Amid all of this elaborate statutory plan for the preservation by regulation of the different types of transportation it would be entirely irrational to deny to the carriers of one type the status of parties in interest to seek court review of Commission orders affecting their competitors of another type. This Court clearly rejected any such approach to carrier regulation in the *Alton* case.

CASES INVOLVING OTHER ADMINISTRATIVE AGENCIES

Cases involving review of orders of other administrativ agencies are all in accord that the status of competito makes one a party in interest entitled to bring the actio for review. Perhaps the leading case is *Federal Commun cations Commission* v. *Sanders Radio Station*, 309 U.S. 47(The Court first held that the Commission could grant an ap plication for a license without considering the economi injury to a competitor. Then the Court held, neverthele that the statute permitting court review of an order o behalf of a person "aggrieved or whose interests are ad versely affected" gave a competitor standing to bring th action for review. The Court relied heavily upon the fac that if the competitor is denied standing it was unlikely tha anyone would challenge the illegal action (p. 477). In th instant case only the appellants are bringing the Commis sion's unlawful order to the Court's attention.

Competitors have standing, because of that status, t obtain review of orders of the Civil Aeronautics Boar *Seaboard and Western Air Lines* v. *C.A.B.*, 181 F. 2d 51 (App. D.C.), and of the Federal Power Commission, *Na tional Coal Assn.* v. F.P.C., 191 F. 2d 462 (App. D.C.).

CASES UNDER THE ADMINISTRATIVE PROCEDURE ACT

In *Universal Camera Corporation* v. *National Labor Re lations Board*, 340 U. S. 474, the Court held that the Ad ministrative Procedure Act, 5 U. S. C. 1001, *et seq.*, en larged the scope of judicial review of administrative order In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, the Court hel that this Act extended judicial review of such orders unde section 10 of the Act to cases where judicial review pr viously was lacking. The Court clearly is giving the A

an "hospitable" interpretation. In *Riss & Company* v. *United States,* 341 U. S. 907, the Court held the Act applicable to proceedings under the Interstate Commerce Act. In view of this clear trend of decision it would not be consistent to narrow the scope of review under the Interstate Commerce Act by denying to appellants the status of parties in interest entitled to sue in the instant case.

CONCLUSION

The Court should note probable jurisdiction in this case.

Respectfully submitted,

JOSEPH H. HAYS
AMOS M. MATHEWS
280 Union Station Building
Chicago 6, Illinois
Attorneys for Appellants

A. L. SCHOENBECK
JAMES W. NISBET
CARL HELMETAG, JR.
EUGENE E. ANDERSON, JR.
J. RAYMOND CLARK
Of Counsel for Appellants

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF THE EASTERN
JUDICIAL DISTRICT OF MISSOURI

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

Civil Action No. 9881(1)

Before SANBORN, Circuit Judge, MOORE and HARPER, District Judges.

MEMORANDUM OPINION

MOORE, Judge.

This is an action brought under Sections 1336, 1398, 2284, and 2321 to 2325 of Title 28 U.S. Code to set aside an order of the Interstate Commerce Commission authorizing defendant C & R Trans., Inc. to acquire control of defendant Keeshin Freight Lines, Inc. and its subsidiary motor carriers, and further authorizing the issuance of certain securities for the financing of such acquisition, which, it is alleged, will place control in defendants John Ruan and Fruehauf Trailer Company, who are alleged to be in control of other motor carriers. The Keeshin companies have been in bankruptcy since 1946, and the Commission order is part of a plan which permits the reorganization of these companies. We are informed that the transactions author-

ized by the Commission's order were consummated shortly after this suit was filed.

All of the defendants, except the United States and the Commission, have filed motions to dismiss on the ground that the plaintiffs are not parties in interest, and have no standing to maintain this action. The United States and the Commission have filed answers setting up this same defense, however.

The plaintiffs allege in the Complaint that they are common carriers by railroad serving the same areas and in competition with the motor carriers involved. They further allege that "Plaintiffs have a direct interest in the enforcement of Section 5 of the Act to the end that no consolidation or joinder under common control of two or more motor carriers should be permitted otherwise than in conformity with Section 5. It is contrary to the interests of plaintiffs for the Commission to approve the proposed transaction contrary to the provisions of Section 5. The National Transportation Policy and the Interstate Commerce Act require that the competition between plaintiffs and the aforesaid motor carriers be regulated and carried out in conformity with the Policy and the Act, including Section 5 thereof, and plaintiffs have a direct interest in the enforcement of the National Transportation Policy and the Act to that end.".

Section 205(g) of the Interstate Commerce Act (49 U.S. C.A Sec. 305(g)) provides:

> "Any final order made under this part shall be subject to the same right of relief in Court by *any party in interest* as is now provided in respect to orders of the Commission made under Part I." (Emphasis added)

And it has been held in *Alton Railroad Company* v. *U.S.*,

315 U.S. 15, that Section 205(g) incorporates by reference the "party in interest" provision of Section 1(20) of the Act.

Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U.S.C.A. Sec. 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided. See *Transamerica Corp.* v. *McCabe*, 80 F. Supp. 704.

Thus the decisions under the Interstate Commerce Act must control the determination of whether the plaintiffs are "parties in interest" within that Act.

There are a number of decisions under these statutes which involve varying factual situations, but none of them are exactly the same as the instant case.

The plaintiffs were permitted to intervene before the Commission, but this alone does not furnish a basis for plaintiffs required "interest." In *Pittsburg & W. Va. Ry. Co.* v. *U.S.*, 281 U.S. 479, the Court said at p. 486: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in absence of resulting actual or threatened legal injury to it. *Alexander Sprunt & Son* v. *United States, ante*, p. 249."

In this case the Complaint fails to allege that the plaintiffs have suffered or been threatened with any damage or financial injury. It does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs. The plaintiffs merely allege that they are in competition with the motor carriers, and that they have a direct interest in the enforcement of the Interstate Commerce Act and the National Transportation Policy.

In *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U.S. 47, the Court stated, at pages 51-52:

> "The Complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U.S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized action of the defendant carrier may directly and adversely affect the Complainant's welfare by bringing about some material change in the transportation situation."

In *Baltimore & Ohio R. Co.* v. *U.S.*, 264 U.S. 258 (Chicago Junction case) the Supreme Court found that the competing rail carriers were "parties in interest" because they had suffered irreparable injury (an annual loss of $10,000,000) and that the acquisition by the defendant railroad of the terminal facilities would prevent the plaintiffs from competing with the defendant on equal terms and subjected them to prejudice and disadvantage.

In *Alton Ry. Co.* v. *U.S.*, 315 U.S. 15, a case heavily relied upon by plaintiffs here, the Court held that rail carriers had standing to maintain a suit to set aside a Commission order granting extensive operating rights to a competing motor carrier because the motor carrier operation threatened to take traffic from the railroads. It is clear from a reading of that case that the order of the Commission directly affected the transportation situation by granting *new operating rights* which threatened the railroads' traffic. In the present order the railroads are not threatened with any new competition from new operating rights which they have not been subjected to in the past.

Thus it appears that there is here no right of the plaintiffs which may have been violated by the order of the Commission and, furthermore, there is no damage alleged. In

other situations it has been held that even where there may be damage, a plaintiff must have some special and peculiar interest which may be directly and materially affected by the action alleged to be unlawful. *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295. And where there is no violation of a right, no action may be maintained and no right exists to be immune from lawful competition or the unauthorized financing of such competition. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 at 479-480.

And in *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118, the Court held one threatened with direct injury by governmental action may not challenge that action "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." There the plaintiffs were held to be without standing to sue because "the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, * * *."

Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no "definite legal right" to be immune from this competition and, therefore, are not "parties in interest" who may maintain this suit.

The motions to dismiss will be sustained and the cause dismissed.

DATED this 5th day of April, 1955.

JOHN B. SANBORN
Circuit Judge, United States Court of Appeals

GEO. H. MOORE
United States District Judge

ROY W. HARPER
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF THE EASTERN
JUDICIAL DISTRICT OF MISSOURI

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

Civil Action No. 9881(1)

JUDGMENT

The Court having before it the motion of defendants C. & R. Trans., Inc., John Ruan, William Drohan & Daniel D. Carmell, Trustees of Keeshin Freight Lines, Inc., Debtor and Subsidiary Debtors, Keeshin Motor Express Co., Inc., Seaboard Freight Lines, Inc., National Freight Lines, Inc., and Keeshin Freight Lines, Inc., to dismiss this cause, and the motion of defendant Fruehauf Trailer Company to dismiss this cause, and having heard the arguments, and the motions having been submitted, and having studied the briefs, and being fully advised in the premises, it is hereby ordered that said motions be sustained and the cause dismissed on the ground that plaintiffs are not parties in interest who may maintain this suit, and Plaintiffs to pay costs.

DATED this 11th day of April, 1955.

JOHN B. SANBORN
Circuit Judge, United States Court of Appeals

GEO. H. MOORE
United States District Judge

ROY W. HARPER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF THE EASTERN
JUDICIAL DISTRICT OF MISSOURI

Civil Action No. 9881(1)

(Title Omitted)

PLAINTIFFS' COMPLAINT

PLAINTIFFS STATE:

1

This action is brought to enjoin, annul and set aside an order of the defendant, Interstate Commerce Commission, hereinafter called the Commission. Jurisdiction and venue of this Court are based upon the provisions of the United States Code: Title 28, Sections 1336, 1398, 2284, and 2321 to 2325, inclusive.

2

Plaintiffs are corporations duly organized and existing. The following named plaintiffs: Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; and Wabash Railroad Company have their principal offices in the City of St. Louis, Missouri, which is within the Eastern Division of the United States District Court for the Eastern District of Missouri.

3

Defendant C. & R. Trans., Inc., hereinafter called C. & R., is a corporation. Defendant Fruehauf Trailer Company,

hereinafter called Fruehauf, is a corporation. Defendant John Ruan, hereinafter called Ruan, is an individual. Defendants William F. Drohan and Daniel D. Carmell, hereinafter called Trustees, are Trustees of the property of Keeshin Freight Lines, Inc., debtor, Keeshin Motor Express Co., Inc., Seaboard Freight Lines, Incorporated, National Freight Lines, Inc., subsidiary debtors, in proceedings for corporate reorganization, No. 46 B 26, in the United States District Court for the Northern District of Illinois, Eastern Division.

4

The report and order of the Commission which are the subject of this action were made in consolidated proceedings before the Commission entitled:

Docket No. MC-F-5696
M. H. Clarke and John Ruan—Control;
C. & R. Trans., Inc.—Control—
Keeshin Freight Lines, Inc., Et Al.
(William F. Drohan and Daniel
D. Carmell, Trustees)

and

Finance Docket No. 18516
C. & R. Trans., Inc. (Delaware),
Keeshin Freight Lines, Inc. (Delaware),
Keeshin Motor Express Co., Inc.
(Illinois), Seaboard Freight
Lines, Incorporated (Connecticut),
and National Freight Lines, Inc. (Iowa)—Securities.

Copy of the report and copy of the order are hereto attached, marked respectively Exhibit A and Exhibit B. They were decided on June 7, 1954, and the order by its terms was ordered to be effective on July 15, 1954.

5

The aforesaid report and order were served on June 15, 1954. On July 12, 1954, and within the time allowed by the Commission's Rules of Practice, the plaintiffs filed and served upon the parties to the proceedings before the Commission their Petition for Reconsideration by the Commission of the aforesaid report and order. A copy of such Petition for Reconsideration is hereto attached marked Exhibit C. The Commission denied the Petition for Reconsideration.

6

In Docket No. MC-F-5606 defendant C. & R. Trans., Inc., and defendant Ruan, holder of all of C. & R.'s capital stock, and the Trustees, filed an application under Section 5 of the Interstate Commerce Act, hereinafter called the Act (49 U.S.C. 5), asking the Commission to authorize C. & R. to purchase the capital stock of the companies held by the Trustees, hereinafter called the Keeshin companies (together with the capital stock of certain related companies whose stock is wholly owned by the Keeshin companies), and to authorize Ruan as sole holder of C. & R.'s capital stock to acquire control of the aforesaid companies through acquisition of control by C. & R. C. & R. is a Delaware corporation, formed in October, 1953, for the sole purpose of accomplishing the above described transaction. Its charter authorizes 250 shares of common stock, par value $100 each, of which $10,000 worth has been issued and is held entirely by defendant John Ruan as aforesaid. (M. H. Clarke was one of the original applicants but he withdrew and is not a party now.)

7

The application was originally submitted, after hearing, to Division 4 of the Commission. Plaintiffs intervened in

the proceeding in opposition to the application, and participated in the hearing as parties. Division 4 (Commissioners Mahaffie, Johnson and Mitchell) denied the application by report and order dated January 29, 1954. One ground for the denial was that Fruehauf Trailer Company would provide most of the financing for the proposed transaction but was not a party applicant.

8

Thereafter the original applicants (except Clarke) filed a petition for reconsideration and further hearing and submitted a revised plan for the proposed transaction. At the same time Fruehauf filed an application to be made a party applicant and a petition to be dismissed as a party applicant. The full Commission granted reconsideration and further hearing, and a further hearing was had in which plaintiffs participated as parties opposing the application for approval of the proposed transaction. Plaintiffs also opposed Fruehauf's petition to be dismissed as a party applicant.

9

Thereafter the Commission issued its report and order of June 7, 1954, as aforesaid, approving the proposed transaction and granting Fruehauf's petition to be dismissed as a party applicant. Commissioners Mahaffie and Johnson dissented on the ground "That, if the proposed transaction is consummated, Fruehauf Trailer Company will be one of the persons in control of these carriers as control is defined in the Act and, accordingly, would deny the petition to dismiss the (Fruehauf) application." (Report, Exhibit A, Sheet 52)

10

Defendant Ruan and his family control through stock ownership two corporations, not heretofore referred to,

Ruan Transport Corporation and Ruan Transport, which hold authority under Part II of the Act as motor common carriers to transport petroleum products in bulk in interstate commerce, over irregular routes in Illinois, Minnesota, Missouri, Nebraska, and Wisconsin. In 1953 these companies had gross operating revenues of about $6,300,000 and operated 500 units of motor vehicle equipment approximately 18,000,000 miles.

11

The Keeshin Companies have authority under Part II of the Act to operate as motor common carriers of general commodities over a network of connected regular routes in Missouri, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, Maryland, New Jersey, West Virginia, and the District of Columbia, serving the principal points in most of such states. They are operated as a single system. In 1953 the Keeshin companies had gross operating revenues of $13,577,160 and a deficit of $986,292.

12

Defendant Fruehauf Trailer Company is engaged, among other things, in the manufacture, sale, and distribution of truck-trailers and truck-bodies. It and its domestic subsidiaries have 8500 employees. It operates eight manufacturing plants in the United States, and operates manufacturing subsidiaries in Canada, France, and Brazil. Its products are sold through 74 company owned sales and service branches. It produces about forty per cent of the freight carrying trailers manufactured in the United States and had net sales in 1953 of $184,590,432.

13

Fruehauf has control of Detroit & Cleveland Navigation

Company, a corporation. Navigation Company owns 150,000 shares of the 415,000 outstanding shares, or 37 per cent, of the common stock of Denver-Chicago Trucking Company, Inc. Furthermore, Navigation Company owns 60 per cent of the total holdings of the ten principal stockholders of Denver-Chicago Trucking Company. On this the Commission's report recites "On the basis of the evidence adduced, the conclusion is warranted that Fruehauf through the Navigation Co., the largest single stockholder of Denver Chicago Trucking, has acquired considerable power in the affairs of this motor carrier, if not the power to control." (Exhibit A, sheets 8-9)

14

Denver-Chicago Trucking Company holds authority under Part II of the Act to operate as a motor common carrier of general commodities over regular routes, among others, extending (1) between New York City and Boston, Mass., on the east, and Tacoma and Seattle, Wash., on the west via Albany, N.Y., Cleveland, Chicago, Cedar Rapids, Iowa, Denver, Salt Lake City, Utah, and Boise, Idaho, (2) between Denver and St. Louis, Mo., via Kansas City, Mo., and (3) between Denver, on the northeast, and Tucson, Ariz., and Los Angeles and San Diego, Calif., on the southwest, via Pueblo, Colo., Albuquerque, N. Mex., and Flagstaff, Ariz., with authority to serve certain intermediate and off-route points.

15

In order to consummate the proposed transaction the following financial commitments have been made. Ruan, and one of his companies referred to in paragraph 10 above, would invest $300,000 in cash, consisting of a contribution of $100,000 to the unearned surplus fund of Keeshin Freight Lines, Inc., one of the Keeshin companies, and purchase of $200,000 of preferred stock to be issued by Keeshin

Freight Lines, Inc. Fruehauf would guarantee payme
of unsecured promissory notes of Keeshin Motor Expre
Co., Inc., one of the Keeshin companies, in the princip
amount of $1,200,000. Fruehauf would also make a dire
unsecured loan to Keeshin Motor Express Co., Inc., o
$400,000. Fruehauf would purchase $500,000 of preferr
stock to be issued by Keeshin Freight Lines, Inc. Fruehau
has paid $265,000 for certain 3½ per cent notes of Keeshi
Freight Lines, Inc., and upon approval of the propose
transaction would surrender them to the maker for cance
lation. Fruehauf's subsidiary, Fruehauf Trailer Compan
of Canada, Ltd., made an unsecured loan of $53,296 t
C. & R. for purchase of the Common stock of Keeshi
Freight Lines, Inc.

Thus Fruehauf would make direct contributions, or com
mitments to obligations, in the total sum of $2,418,296, i
order to consummate the proposed transaction, all withou
any security (save the equity, if any, in the $500,000 of pr
ferred stock).

16

An officer of Fruehauf devoted all of his time from Janu
ary, 1954, to April 20, 1954 (the date of the further hea
ing), in trying to work out a plan of reorganization of th
Keeshin Companies, and during that time worked in clos
contact with John Ruan and his associates. If the propose
transaction were approved part of the duties of such office
as an officer of Fruehauf would be "keeping an eye upo
the operations and management of the new company
Fruehauf would take whatever steps might be available t
it under the proposed transaction for the protection o
Fruehauf's interests whenever action might be necessar
After approval of the transaction was denied by Division
of the Commission on January 29, 1954, Ruan wanted t
abandon the project but was persuaded by Fruehauf to fi

the application for reconsideration and further hearing. Ruan and his motor carrier companies described in paragraph 10 above owe substantial sums to Fruehauf on outstanding motor vehicle equipment obligations. Ruan is the sole owner of Ruan Equipment Co., a non-carrier, which owns 250 tractors which it leases to Fruehauf for long terms without drivers. These tractors are used by Fruehauf to effect delivery of trailers to purchasers. Leasing these tractors to Fruehauf and servicing them is the sole business of Ruan Equipment Co. Ruan owns 200 shares of stock of Fruehauf. If the proposed transaction is consummated Ruan or his company will purchase 200 trailers from Fruehauf.

17

As stated above, the Commission granted Fruehauf's petition to dismiss Fruehauf as a party applicant, and dismissed Fruehauf's application to be made a party applicant. This action of the Commission is a direct violation of Section 5 of the Act, 49 U.S.C. 5. This action is of such nature as to render the Commission's order approving the proposed transaction entirely void as beyond the Commission's powers under Section 5. The applications for approval of the proposed transaction were filed pursuant to the terms of Section 5 and the proposed transaction can be approved only in conformity with the provisions of that section.

Subparagraph (b) of paragraph (2) of Section 5 provides in part:

> "(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *."

Subparagraph (b) further requires submission of the application to the Commission and a finding by the Commis-

sion, as a requisite to approval, that the proposed transaction will be consistent with the public interest. Those provisions require Fruehauf to file an application and be and remain a party applicant.

Paragraph (4) of Section 5 provides in part:

> "(4) It shall be unlawful for any person except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company, or companies, a voting trust or trusts, or in any other manner whatsoever. * * * As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Those provisions make it entirely clear that it is "unlawful for any person," including Fruehauf, to do the things described in paragraph (4) "except as provided in paragraph (2)" which includes the requirement of paragraph (2) (b) for the filing of an application, submission of such application to the Commission for approval, and approval, not dismissal, of the application.

Paragraph (5) of Section 5 provides in part:

> "(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—
>
> • • • • •
>
> "(c) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated

with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier."

The evidence before the Commission, and the Commission's Report (Exhibit A), make it entirely clear that at the very least Fruehauf and Ruan are now "two or more persons acting together, one of whom (Ruan as owner of Ruan Transport) is a carrier or is affiliated with a carrier" within the meaning of Section 5 and that "the effect of such transaction" will place John Ruan and Fruehauf "in control of another carrier" (Keeshin lines). This is plain when the power of Fruehauf to control Denver Chicago Trucking Co. is not taken into consideration. When the power of Fruehauf to control Denver Chicago is considered as shown in the record, then John Ruan and Fruehauf are each a person in control of a carrier seeking together to acquire control of a third carrier.

On both of these aspects the Commission said:

"It is apparent that Ruan and Fruehauf have worked together in formulating this transaction. Without the financing of Fruehauf, the plan would not be possible. We are also not unaware of the power and influence which a substantial creditor and preferred stockholder, especially one engaged in a business so closely connected with transportation, can wield over the management of a carrier. The situation here has been further complicated by the acquisition by Fruehauf and its representatives of considerable power in the control of Denver Chicago Trucking. Controlled or managed in a common interest, this carrier and the Keeshin system would span the continent and blanket the industrial area north of the Ohio and east of the Mississippi Rivers. This record fails to contain evidence adequate to support a finding that such control

> or management in a common interest would be consistent with the public interest; nor, in our opinion, was the presence of this question in the case known prior to the further hearing." (Report, Exhibit A, sheets 42-43)

Section 5 shows on its face that it was designed to require identification of a person, such as Fruehauf, participating in transactions of this character, and to require establishment of the status of such person as a "person," or as a "carrier," or as "affiliated with a carrier," or as having "control or management" or "the power to exercise control or management" of a carrier, as those terms are used in the Act. One principal purpose of the statute in requiring such identification and establishment of status is to prevent acquisition of "control or management" or "the power to exercise control or management" of a carrier by a person outside the jurisdiction of the Commission. A further principal purpose, connected with the foregoing, is to prevent a person outside the Commission's jurisdiction from silently obtaining control or management (in any one of its various gradations contemplated in the Act) of one carrier after another and thereby building monopoly in violation of the anti-trust laws. This summary of purposes is not intended to be complete. It is set out here to show that, in granting Fruehauf's petition to be dismissed as a party applying for approval of the proposed transaction, the Commission defeated certain principal purposes of Section 5, thereby exceeding its powers and rendering its order illegal and void.

Section 1 (3) (b) of the Act shows how completely Congress is concerned with identification and establishment of status of any person having control of a carrier, as control is therein very broadly defined. This definition is made

applicable to various sections of Parts I, II, and III of the Act:

> "(b) For the purposes of Sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

The Commission violated the express requirements of Section 5 when it granted the petition of Fruehauf to be dismissed as a party applicant, and it thereby lost jurisdiction to make the order in question.

18

Irrespective of any question relative to the dismissal of Fruehauf's application, the Commission violated the provisions of Section 5 in approving the proposed transaction and its order is in excess of its powers and is void. Ruan now controls one or more motor common carriers operating under authority of Part II of the Act (Ruan Transport and Ruan Transport Corporation). Fruehauf now controls Detroit & Cleveland Navigation Co. Navigation Co. owns 37 per cent of the outstanding capital stock of Denver-Chicago Trucking Co. Navigation Co. is the largest single stockholder of Denver-Chicago and Navigation Co. owns sixty per cent of the total stock held by the ten largest stockholders of Denver-Chicago. It is plain that Fruehauf controls Denver-Chicago or has power to control it, in at

least one of the forms of control defined in Section 5. Denver-Chicago is a very large motor common carrier operating between the Atlantic and Pacific coasts under the authority of Part II. It is clear that Fruehauf would be in control of the Keeshin Companies, in at least one of the forms of control defined in Section 5, upon approval of the proposed transaction. The Commission found that there is no evidence in the record adequate to support a finding that control by Fruehauf of the Keeshin companies and Denver-Chicago would be consistent with the public interest as required for approval under Section 5 (2) (b).

19

It is not consistent with the public interest to permit Fruehauf, one of the principal manufacturers of truck-trailers, to obtain control of Keeshin lines, as control is defined in the Act.

20

Plaintiffs are common carriers by railroad engaged in the transportation of freight for hire as originating, intermediate, or terminating carriers throughout the areas served by the Keeshin lines, by the Denver-Chicago Trucking Company, and by the Ruan companies. Plaintiffs serve all of the points in such areas either directly or as participating carriers in through movements. Plaintiffs are competitors of the aforesaid motor carriers in such areas in the transportation of freight. Plaintiffs have a direct interest in the enforcement of Section 5 of the Act to the end that no consolidation or joinder under common control of two or more motor carriers should be permitted otherwise than in conformity with Section 5. It is contrary to the interests of plaintiffs for the Commission to approve the proposed transaction contrary to the provisions of Section 5. The National Transportation Policy and the Inter-

state Commerce Act require that the competition between plaintiffs and the aforesaid motor carriers be regulated and carried on in conformity with the Policy and the Act including Section 5 thereof, and plaintiffs have a direct interest in the enforcement of the National Transportation policy and the Act to that end.

WHEREFORE, PLAINTIFFS PRAY:

(1) That a district court of three judges as provided by Title 28, U.S.C., Section 2284, be organized and convened to hear this cause;

(2) That, upon hearing, the court annul and set aside and enjoin the enforcement of the aforesaid order of the Commission; and

(3) That the court grant the plaintiffs such other relief as may be just.

(Signed by attorneys for plaintiffs)

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362850—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C. & R. TRANS., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellee, the Interstate Commerce Commission, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on April 11, 1955, by a three-judge district court convened pursuant to 28 U. S. C.

2284 and 2325, dismissing a complaint seeking to set aside a Commission order. The contested order, which was entered by the Commission on June 7, 1954, under sections 5 and 214 of the Interstate Commerce Act (49 U. S. C. 5 and 314), authorized, subject to certain specified conditions, the acquisition by C. & R. Trans., Inc., of control of Keeshin Freight Lines, Inc., through purchase of capital stock and, through such acquisition, control of several affiliated corporations, and the acquisition by John Ruan of control of the said corporations; and authorized Keeshin Freight Lines, Inc., and certain of its affiliates to refinance their operations through the issuance of preferred stock and notes. C. & R. was incorporated on October 23, 1953, for the purpose of accomplishing this transaction. (60 M. C. C. 175.)

Keeshin Freight Lines, Inc., is a holding company whose assets include the capital stock of three subsidiary corporations which are engaged in motor carrier operations over approximately 15,650 miles of routes in 16 states and the District of Columbia. These routes extend, roughly, between Minneapolis, Des Moines and St. Louis, on the west, and Boston, Providence, New York City, Philadelphia and Washington, on the east, through central states north of the Ohio River. In 1953, the Keeshin companies had gross operating revenues of $13,577,160. The holding company, together with its operating subsidiaries, is

commonly referred to as the Keeshin system. (60 M. C. C. 179–182.)

On January 31, 1946, trustees were appointed under Chapter X of the Bankruptcy Act in the United States District Court for the Northern District of Illinois, Eastern Division, for the reorganization of the Keeshin system. A plan of reorganization was approved by the Court on January 19, 1954. Fruehauf Trailer Company, a major creditor of Keeshin, agreed to furnish a part of the additional financial support necessary under the plan.

Hearings were held on the applications on four days in December, 1953, following which Division 4 of the Commission, in its report and order dated January 29, 1954, denied the applications. (60 M. C. C. 5.) In the concluding paragraphs of the report, the Division stated:

> Fruehauf is not a party applicant in the proceeding. The record is silent as to who controls Fruehauf, its financial condition, its possible affiliations with other carriers, or the affiliations of the person or persons who control it. Under the circumstances here, and under the terms and conditions of this transaction, complete information on these matters and the joinder of Fruehauf as a party applicant as one of the real parties in interest, are necessary to any affirmative determination of the issues presented.

> We find that the proposed transaction has not been shown to be consistent with the public interest, and that the application, accordingly, should be denied. (60 M. C. C. 27.)

On March 25, 1954, Fruehauf filed an application under section 5 of the Interstate Commerce Act for authority to become a party applicant in the proceedings, and, in order to obtain a determination as to whether it was a material party to the application, pursuant to the usual and accepted practice, filed with the Commission at the same time a petition seeking to be dismissed as a party applicant. In its petition, Fruehauf alleged that its interest in the plan of reorganization and in the application before the Commission was solely that of a creditor, seeking to protect its financial position, that it had no desire to control Keeshin, and sought no voice in its management. (60 M. C. C. 174.)

At the request of applicants, the proceeding was reopened by the Commission for further hearing and reconsideration. Further exhaustive hearings were held on three days in April 1954, during which Fruehauf's connection with the transaction was explored fully. The entire Commission issued its report and the order which is now under attack on June 7, 1954. (60 M. C. C. 173.) The Commission approved the acquisition of control of Keeshin by C. & R. and John Ruan under prescribed conditions and lim-

itations and dismissed Fruehauf as a party to the proceeding; it also authorized issuance by Keeshin of securities and notes in specified amounts. The Commission in its report concluded in part:

> Fruehauf disavows any intention or desire to control, or to participate in the control or management of the Keeshin companies. Our findings herein, and dismissal of its application, will be on the basis that it will not do so, and conditions will be imposed designed to insure, so far as possible, the complete independence of these carriers from such control or influence, or of affiliation with Denver Chicago Trucking. Further, we shall continue to observe the situation which will evolve from our action herein, and should future circumstances require, we shall not hesitate to take such action as may be necessary under section 5 (7), or otherwise, to insure the independence. (60 M. C. C. 200.)
>
> * * * * *
>
> * * * Obviously, the potential earning power of these carriers in this territory is substantial. While the obligations and fixed charges to be incurred will be heavy, the rehabilitation of the system would clearly be in the public interest, if accomplished. We believe an opportunity should be afforded for that rehabilitation, rather than liquidation, which would almost certainly result if we were to deny the application. The revised terms may properly be approved, and the resulting fixed

> charges to be incurred would not be inconsistent with the public interest. (60 M. C. C. 201.)

Commissioners Mahaffie and Johnson dissented, stating in the conclusion of their opinion that they would find that if the proposed transaction is consummated, Fruehauf "will be one of the persons in control of these carriers as control is defined in the act and, accordingly, would deny the petition to dismiss the application." (60 M. C. C. 206)

On July 12, 1954, appellants herein filed a petition for reconsideration. In an order entered on July 14, 1954, the Commission denied the petition, stating:

> * * * the material matters set forth in the petition have been considered by the Commission and discussed in the said report, and the petition presents no facts or arguments which warrant reconsideration.

Thereupon, the appellants filed this action but did not seek a temporary restraining order or preliminary injunction, and the transaction approved by the Commission was formally consummated about August 1, 1954. Motor carrier operations have been conducted actively by the applicants continuously since that time.

The District Court, in dismissing the complaint, pointed out that it failed to allege that the plaintiffs have suffered or been threatened

with any damage or financial injury, or that any definite legal right of the plaintiffs had been violated, and concluded that they are not parties in interest who may maintain this suit. (Jurisdictional Statement, pp. 20–24)

QUESTION PRESENTED

Whether the District Court erred in dismissing the complaint on the ground that appellants "are not 'parties in interest' who may maintain this suit", where the complaint alleged only that the appellants are common carriers by railroad competing with the motor carriers involved in the areas served and have a direct interest in the enforcement of section 5 of the Interstate Commerce Act and the National Transportation Policy, and failed to allege that appellants have suffered or been threatened with any damage or financial injury, or that any definite legal right of theirs has been violated or that the Commission's order has resulted in any increased competition for them.

ARGUMENT

Appellants allege that the Commission erred in not finding that Fruehauf would be in control of Keeshin, and in not requiring Fruehauf to apply for and obtain Commission approval under section 5 of such acquisition of control. The allegations of the complaint, however, are insufficient

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to show that the appellants have any legal right or standing to challenge the Commission's order. The only allegations in the complaint regarding this subject are those contained in paragraph 20 thereof, in which the plaintiffs allege that they are common carriers by railroad and as such serve the areas and points served by the motor carriers involved and compete with those carriers, and that the plaintiffs have a direct interest in the enforcement of section 5 of the Interstate Commerce Act and the National Transportation Policy.

The complaint fails to allege that either of the plaintiffs has suffered or will suffer any injury or damage by reason of the entry by the Commission of the order under attack; or that any legal right possessed by either of them has been invaded, adversely affected, or threatened by the action of the Commission; or that approval of the applications in question will create or result in any additional motor carrier service in the area involved, or would result or has resulted in any increased competition for the plaintiffs or any loss of business or traffic which they now enjoy. None of the allegations of the complaint, including those set forth in paragraph 20 referred to above, constitute any legal basis for instituting or maintaining this suit. The plaintiffs do not allege that they have any direct interest in the transaction in question, but only that they have a direct interest in the enforce-

ment of section 5 of the Interstate Commerce Act and the National Transportation Policy generally.

The courts have consistently held that the Commission has broader discretionary powers in deciding section 5 applications, such as this one, than those under other sections of the Interstate Commerce Act. *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 82; *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, affirmed *per curiam* 338 U. S. 902.

Moreover, the complaint does not allege that the findings of the Commission are inadequate or that they are not supported by substantial evidence; nor does it allege that there was no rational basis for the Commission's approval of the applications, nor that the Commission acted arbitrarily or capriciously. In substance the only errors which the complaint alleges that the Commission committed are the dismissal of Fruehauf as a party applicant, and in the approval of the applications, which actions the appellants contend constituted violations of section 5 of the Interstate Commerce Act (49 U. S. C. 5). (Paragraphs 17 and 18 of the complaint, Jurisdictional Statement, pp. 33, 36 and 37.)

Section 1 (20) of Part I of the Interstate Commerce Act, concerning the regulation of railroads, states in part:

> Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19)

> of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest * * *.

Section 205 (g) of Part II of the Interstate Commerce Act, pertaining to the regulation of motor carriers, provides:

> Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I.

In order to maintain a suit to set aside an order of the Commission it is essential that the complaint show that the complainant has suffered, or has been threatened with, some legal injury to it by reason of the Commission's action. The mere fact that the complainant intervened in the Commission proceeding does not entitle it to maintain such suit in the absence of actual or threatened injury. *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479, 486; *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. The complaint must disclose that some definite legal right possessed by the complainant is seriously threatened, or that the action complained of may directly and adversely affect complainant's welfare. *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, 51–

52; *Pennsylvania R. Co.* v. *United States, et al.*, 40 F. (2d) 921, 925. Cf. *Baltimore & Ohio R. Co., et al.* v. *United States, et al.*, 264 U. S. 258.

In their arguments before the lower court, and also in their jurisdictional statement filed here, the appellants have relied heavily upon the decision of this Court in *Alton Railroad* v. *United States*, 315 U. S. 15, in which it was held that the plaintiffs there had standing to maintain the action. We submit that there are marked distinctions between that case and this one, as we shall hereinafter point out.

The *Alton* case involved an attack upon an order entered by the Commission granting a certificate of public convenience and necessity to John P. Fleming Driveaway Service, under the so-called "grandfather" clause of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a)), authorizing that motor carrier to engage in the transportation of automobiles from Detroit, Michigan, to all points in California, New York, Pennsylvania, Tennessee, Washington, Oregon, Kentucky, North Carolina, Texas, South Carolina, and Georgia. The Commission had authorized these extensive operations although it had found in its report that the applicant had shown that it had transported between January 1, 1934 and June 1, 1935, only from one to seven shipments to each of those states. The plaintiff railroads contended that the Commission was without authority to permit the applicant to serve these entire states

when it had actually transported traffic to only a very limited number of points in each of them prior to the "grandfather" date, and that the authority granted should be restricted accordingly.

The instant case, on the other hand, involves an attack upon an order entered by the Commission under sections 5 and 214 of the Interstate Commerce Act (49 U. S. C. 5 and 314), which had authorized acquisition by a corporation of control of a motor carrier then in operation and the issuance of certain securities and notes in connection therewith. The entry by the Commission of the order complained of did not tend to expand the existing motor carrier authority, or to grant any additional authority. It merely permitted the applicants to acquire control of existing motor carriers, without resulting in any additional motor carrier service in the area involved, or in any increased competition for the appellants.

Thus, the order in the *Alton* case was entered under section 206 (a) of the Act, and involved a specific grant of authority which had the effect of enabling the applicant to expand its operations greatly beyond the limited points it was then serving, whereas the order in the instant case was entered pursuant to sections 5 and 214 of the Act *and was only a permissive order,* and did not create any new motor carrier rights or intensify competition for the plaintiffs. More-

over, there is a marked difference between the complaint in the *Alton* case and the complaint in this case. For instance, in paragraph 7 of the complaint in the *Alton* case, (pp. 4 and 5 of transcript filed in this Court), it was alleged that the appellants "are prejudiced and injured by said report and order." No such allegation appears in the complaint in the instant case.

The differences between the two cases are obvious, and the *Alton* case is not controlling here. Although the decision in that case was rendered subsequent to the decisions of the Supreme Court in *Pittsburgh & W. Va. Ry. Co.* v. *United States, et al., supra; Alexander Sprunt & Son* v. *United States, supra; Edward Hines Trustees* v. *United States, et al.,* 263 U. S. 143, and other cases in which complaints were dismissed because of plaintiffs' lack of legal interest or standing to sue, the *Alton* decision does not reject or nullify the latter decisions. Also see *L. Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295; *Boston Tow Boat Co.,* v. *United States,* 321 U. S. 632; *Moffatt Tunnel League* v. *United States,* 289 U. S. 113.

In sum, this Court has held that competitors have standing to challenge Commission orders only where they allege that the order inflicted some direct financial injury upon them, as in *Baltimore & Ohio R. Co., et al.* v. *United States, et al.* (*The Chicago Junction case*), *supra,* or where the order permitted *new* competition to

enter the field, as in *Alton Railroad* v. *United States, supra.* The Court never has held that standing to challenge an order permitting a combination of existing carriers, but without increasing their operations, can be predicated on the mere fact that the complainant competes with the combined carriers. Appellants' complaint alleged only that they were competitors of the carriers involved, but not that they had suffered damage. That was insufficient to give them standing.

The appellants lay great stress upon the fact that the Commission, in *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.,* 57 M. C. C. 467, 471–472, permitted railroad protestants to intervene and present evidence in the proceeding on a section 5 application. The Commission's action in that case does not lend any support to appellants' position, for this Court said in *Pittsburgh & W. Va. Ry. Co.* v. *United States, supra,* at page 486, that "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened injury to it." Moreover, in the *Pacific Intermountain Express Co.* case, *supra,* a complete unification of existing carriers was proposed.

Here, the appellants' attack upon the Commission's order assumes that the Commission erred in finding that the proposed transactions would

not place Fruehauf in control of Keeshin. It further assumes that the Commission will not, contrary to its express assertion, take effective action under section 5 to prevent any unauthorized assumption or exercise of such control by Keeshin in the future. Upon the basis of these assumptions, the appellants speculate that they may be injured in unspecified respects in the indefinite future. We submit that such assumptions and speculations do not provide appellants with standing to challenge the Commission's order.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct, and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel.

ISAAC K. HAY,
Assistant General Counsel.
Interstate Commerce Commission,
12th and Constitution Avenue, N. W.,
Washington 25, D. C.

OCTOBER, 1955.

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HAROLD B. WILLEY

No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION TO AFFIRM

ROBERT D. EVANS,
JOHN R. GREEN, II,
1730 Boatmen's Bank Building,
St. Louis 2, Missouri.

FLOYD F. SHIELDS,
111 West Washington Street,
Chicago, Illinois,

ERNEST L. RUSHMER,
10940 Harper Ave.,
Detroit, Michigan.

ARTHUR D. CONDON,
1000 Vermont Ave., N. W.,
Washington 5, D. C.

Attorneys for Appellees, Fruehauf Trailer Company, C. & R. Trans., Inc., John Ruan, and William F. Drohan and Daniel D. Carmell, Trustees.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, all Appellees, except the United States of America and the Interstate Commerce Commission, move that the judgment of the District Court be affirmed on the ground that the appeal presents no substantial question warranting further argument.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1 (20) and 305 (g) are set forth in the Appendix, *infra*, pp. 9, 10.

STATEMENT

This is a direct appeal from a final judgment entered on April 11, 1955, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing this cause which sought to set aside an order of the Interstate Commerce Commission.

The order of the Commission authorized a transfer of control of certain motor carriers (the so-called Keeshin Lines) then in bankruptcy, and authorized the refinancing necessary to permit those motor carriers to reorganize and come out of bankruptcy. The report of the Commission appears at 60 M.C.C. 173. The judgment of the court below ordered that the cause be dismissed ". . . on the ground that plaintiffs are not parties in interest who may maintain this suit . . ." (Statement as to Jurisdiction, 25). The opinion of the district court is printed in the Statement as to Jurisdiction at page 20.

At the time the proceedings before the ICC were commenced, the Keeshin Lines had been in bankruptcy in proceedings under Chapter X in the United States District Court in Chicago for approximately eight years; several attempts at reorganization had failed. (60 M.C.C. 179). Fruehauf Trailer Company was a substantial creditor of the Keeshin Lines (60 M.C.C. 185) and consequently was interested in effecting a successful reorganization of those lines. The bankruptcy court approved a plan of reorganization, and John Ruan and C. & R. Trans., Inc., began the proceedings before the Commission to obtain the Commission's approval of the necessary financing and transfer of control of the bankrupt companies.

In these proceedings numerous railroads were permitted to intervene. It was their contention that, under the proposed refinancing, Fruehauf would be one of the persons in control of the reorganized Keeshin Lines, as control is defined in the Interstate Commerce Act, and that Frue-

hauf should therefore apply for authority to obtain control under Section 5 (2) of the Act (60 M.C.C. 198). Plaintiff's contention was based partially on the argument that two directors of Fruehauf then owned stock in the Detroit & Cleveland Navigation Company, which company owned thirty-seven per cent of the stock of Denver Chicago Trucking Company (60 M.C.C. 178), and that Fruehauf, therefore, controlled the Denver Chicago Trucking Company (60 M.C.C. 198); approval of the proposed transfer of control, it was argued, would improperly permit Fruehauf to acquire control of additional motor carriers, in violation of Section 5 (2) of the Act (60 M.C.C. 198). However, the Commission determined that under the proposed plan Fruehauf's relationship with these lines would be essentially that of a large creditor, not a person in control of the lines (60 M.C.C. 200-201). Simultaneously, the Commission approved the plan of reorganization (60 M.C.C. 173 et seq.).

The railroad intervenors then brought this proceeding in the district court to enjoin enforcement of the order approving the financing and transfer of control necessary to effectuate the plan of reorganization, alleging that the Commission erred in finding that Fruehauf would not be in control of the reorganized Keeshin Lines. The complaint named as defendants the United States, the Interstate Commerce Commission, John Ruan, C. & R. Trans., Inc., Fruehauf Trailer Co., and the trustees of the Keeshin Lines. With respect to the plaintiffs' interest in the matter, the complaint alleges simply that the plaintiff railroads compete with the Keeshin motor carriers throughout the areas served by those motor carriers. (Statement as to Jurisdiction, 38). The district court dismissed on the ground that plaintiff railroads "are not parties in interest who may maintain this suit" (Statement as to Jurisdiction, 25).

ARGUMENT

The question presented is whether the plaintiff railroads have standing to sue to set aside an order of the Commission authorizing a transfer of control of motor carriers, which order is alleged to be in violation of Section 5 (2) of the Act.

Plaintiffs' standing to sue must derive, if at all, from Section 205 (g) of the Act, which provides that orders of the Commission made under Part II of the Act, which regulates motor carriers in interstate commerce, ". . . shall be subject to the same right of relief in Court by any party in interest as is now provided in respect to orders of the Commission made under Part I" (p. 10, *infra*). This section incorporates by reference the "party in interest" provision of Section 1 (20) of the Act. *Alton Railroad Co.* v. *United States*, 315 U.S. 15. Thus only a "party in interest" may challenge an order of the Interstate Commerce Commission in the district court.

1. As the district court pointed out in its opinion (Statement as to Jurisdiction, 20), it is well established that a plaintiff, to qualify as a "party in interest," must allege that some definite legal right of the plaintiff is seriously threatened; or that the allegedly unauthorized action may directly and adversely affect the plaintiff's welfare; or that the plaintiff has some special interest which may be directly and materially affected. *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U.S. 47, 51-52; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U.S. 295, 303-304. It is not sufficient that the plaintiff have the interest of the ordinary citizen in enforcement of the law; he must have "a legal right or interest that will be injuriously affected by the order." *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 119; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, *supra*.

The most minute examination of the complaint in this case (Statement as to Jurisdiction, 26) will not disclose

any allegation of such a "legal right or interest." The complaint does not allege that the Commission's order will result in any actual or threatened injury to plaintiffs. Nor could plaintiffs in good faith offer any allegation of injury, for the Commission's order concerned only the internal affairs of the debtor motor carriers. The complaint alleges only that plaintiff railroads compete with the Keeshin motor carriers (Statement as to Jurisdiction, 38), and it is manifest that no "legal right or interest" of plaintiffs will be "injuriously affected" by the order transferring control of the Keeshin motor carriers.

It is significant that before the Commission plaintiff railroads did not even suggest that the proposed transfer of control would directly affect the railroads adversely, but merely that Fruehauf might be able at some undetermined future time to take over other motor carriers, tending to acquire a monopoly which would be contrary to the public interest (60 M.C.C. 198-199). This vague speculation serves to illustrate the remoteness of the interest of plaintiffs.

This Court has repeatedly held that "the mere fact that . . . [plaintiff] . . . was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order, in the absence of resulting actual or threatened legal injury to it." *E.g., Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U.S. 479, 486-487. Where, as in this case, "there is no suggestion that the order can affect [plaintiff] as a carrier," the plaintiff lacks standing to sue (*idem*).

2. Appellants, resolutely ignoring the opinion of the district court, continue to cite the same cases cited below, without answering the distinctions noted by the court.

Appellants rely principally on the case of *Alton Railroad Co.* v. *United States*, 314 U. S. 15 (Statement as to Jurisdiction, 10-13). That case involved the application of a motor carrier for a certificate of public convenience and

necessity under the "grandfather clause." The matter at issue was the right of the motor carrier to operate, and thus whether the plaintiff railroad would be confronted with the competition of this motor carrier. The Commission's order granted the operating rights to the motor carrier, and authorized operating rights to all points in certain states, even though the motor carrier's previous operations had been limited to only a few points in those states. While the Court held that the competing railroads had standing to sue in the *Alton* case, it is apparent that that case involved the right of a motor carrier to conduct additional operations in competition with the railroads, and not merely a transfer of control of a motor carrier with established operating rights.

Nevertheless, from that case appellants argue that competition between railroads and motor carriers, or service to the same points by railroads and motor carriers, "establishes a status of 'party in interest' " (Statement as to Jurisdiction, 12); and that, if competition exists, it is not necessary to allege or prove financial loss or other injury (Statement as to Jurisdiction, 11). As the Court below pointed out (Statement as to Jurisdiction, 23), neither reason nor authority would permit the application of such a rule to an order that affects only the internal management or control of a competing carrier. A railroad is properly entitled to challenge an order authorizing new motor carrier competition, but it is not entitled to sue to enjoin enforcement of an order dealing only with the internal affairs of a competing motor carrier.

As we have indicated above, the present case does not involve the establishment of motor carrier operations. It involves only a transfer of control of previously established motor carrier operations. The Commission's order in this case affected only the internal management and control of the Keeshin Lines, a matter in which competing railroads have no direct interest.

Appellants also rely on the case of *Baltimore & Ohio Railroad Co.* v. *United States,* 264 U. S. 258 (Statement as to Jurisdiction, 9). In that case, certain railroads brought suit to set aside a Commission order which authorized the New York Central Railroad to acquire control of certain terminal railroads. The plaintiff railroads had been served impartially by the terminal railroads before the New York Central acquired control of them, but were thereafter subordinated to the preferential interests of the New York Central. The plaintiffs were competitors of the New York Central and their loss of the impartial use of the terminal railroads resulted in an annual loss to the plaintiffs of $10,000,000.00. This Court observed that the loss was an "injury inflicted by denying to the plaintiffs equality of treatment," and held that "the plaintiffs, being competitors . . . and users of the terminal railroads theretofore neutral" had standing to sue. 264 U. S. at 267.

There is no similarity between the *Baltimore & Ohio* case and the present case. Plaintiffs in this case are not "users" of the Keeshin Lines who have been denied equality of treatment in the use of the motor carriers involved. Nor have plaintiffs alleged any financial loss whatever. There is nothing in the complaint to show that plaintiffs are in any way affected by the internal reorganization of the Keeshin Lines.

3. Appellants' reliance on the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding paras. 1, 301, 901 and 1001, is without merit (Statement as to Jurisdiction, 16-17). The nature of this argument is not entirely clear, but it cannot seriously be suggested that the National Transportation Policy confers on a person not injured in any way a right to obtain judicial review of an order of the Commission dealing only with the internal reorganization of bankrupt motor carriers.

4. Equally without merit is appellants' reliance on cases involving other administrative agencies, and on the Admin-

istrative Procedure Act, 5 U.S.C. 1001 et seq. (Statement as to Jurisdiction, 18-19). None of the cases cited holds that a plaintiff, albeit a competitor, may challenge an administrative order which does not injure the plaintiff at all. And the Administrative Procedure Act, which appellants refrain from quoting, contemplates judicial review only at the instance of "any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any revelant statute . . ." 5 U.S.C. 1009 (a).

CONCLUSION

The complaint does not allege that appellants will suffer any financial loss. Nor does it allege facts showing that any definite legal right of appellants is threatened, or that the Commission's order will directly and adversely affect appellants' welfare. The Statement as to Jurisdiction simply ignores, rather than challenges, the points made by the district court in holding that appellants lack standing to sue. It is respectfully submitted that the decision below is correct, and that this appeal does not present a substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

ROBERT D. EVANS,
JOHN R. GREEN, II,
FLOYD F. SHIELDS,
ERNEST L. RUSHMER,
ARTHUR D. CONDON,
Attorneys for Appellees, Fruehauf Trailer Company, C. & R. Trans., Inc., John Ruan, and William F. Drohan and Daniel D. Carmell, Trustees.

APPENDIX

Statutes Involved

INTERSTATE COMMERCE ACT, Section 1 (20), 49 U.S.C. 1 (20):

(20) Issuance of certificate by Commission—Unlawful extension or abandonment of lines.—The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any Court of competent jurisdiction at the suit of the United States, the Commission, or any commission or regulating body of the State or States affected, or *any party in interest*; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. (Italics added.)

INTERSTATE COMMERCE ACT, Section 205 (g), 49 U.S.C. 305 (g):

(g) Court review of Commission's orders—Compelling Commission to take jurisdiction. Any final order made

under this part shall be subject to the same right of relief in court *by any party in interest* as is now provided in respect to orders of the Commission made under part I. Provided, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction. (Italics added.)

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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; AND OTHERS,

Appellants.

VS.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C.&.R. TRANS., INC.; AND OTHERS,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OPPOSING MOTIONS TO AFFIRM

JOSEPH H. HAYS
AMOS M. MATHEWS
280 Union Station Building
Chicago 6, Illinois
Attorneys for Appellants

A. E. SCHOENBECK
JAMES W. NISBET
CARL HELMETAG, JR.
EUGENE E. ANDERSON, JR.
J. RAYMOND CLARK
Of Counsel for Appellants

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 400

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; and others,

Appellants,

vs.

United States of America; Interstate Commerce Commission; C.&R. Trans., Inc.; and others,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16, paragraph 3, appellants submit the following brief opposing appellees' motions to affirm. Two motions have been filed: By the Interstate Commerce Commission and by the private appellees. This brief opposes both motions.

Each motion asserts that the allegations of paragraph 20 of the complaint (St. as to Juris. pp. 38-39) together with the rest of the complaint are insufficient to show that appellants are parties in interest entitled to maintain the action. This contention is without merit. As a part of their argument appellees rely upon an obviously erroneous construction of *Alton Railroad Co.* v. *United States,* 315 U.S. 15.

THEIR STATUS AS COMPETITORS OF THE INVOLVED MOTOR CARRIERS GIVES APPELLANTS STANDING AS PARTIES IN INTEREST ENTITLED TO SUE

Appellants allege that they serve all of the points served by the various large motor carriers which the Commission's void order placed under common control in violation of section 5 of the Interstate Commerce Act, 49 U.S.C. 5, and that they are *competitors* of such motor carriers in the transportation of freight. The District Court, and appellees in their motions, thought this was not enough, and apparently attached no significance to the allegation that appellants are *competitors* of such motor carriers.

In this the District Court and appellees are in plain error. The Interstate Commerce Act, other Federal statutes, and the decisions of this Court establish that the word "competitor" as such describes a factual status of wide significance. "Competitor" includes the concept of economic injury resulting from illegal administration of laws designed to regulate competitive conditions. The status of competitor makes one a party in interest entitled to challenge such illegal administration. This Court so held in *Alton Railroad Co.* v. *United States, supra,* 315 U.S. 15, which of course gives rise to appellees' attempts to distinguish that case from this.

The Interstate Commerce Act uses the word "competitor" and "competitive" many times to forbid or to authorize action by one carrier in relation to another carrier or a shipper.[1] ("The word 'competition' imports the existence of present or potential competitors." *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 649.) The National Transportation Policy forbids "unfair or destructive competitive practices" and obviously that would include illegal competitive practices.

In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, the Court said in respect to a Commission proceeding, like the instant case, under section 5(2):

> "Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antitrust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on *competitors* and on the general *competitive* situation in the industry in the light of the objectives of the national transportation policy." (Emphasis added).

The Commission's regulations governing applications for new motor carrier operating authority, and for authority to consolidate existing motor carriers under unified control, contain the following identical provisions (49 C.F.R. §§168(b), 180.1(b), 180.6(b), 180.50(b)):

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[1] National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding section 1; 49 U.S.C. sections 4(1)(2), 5(1), 5(2)(b), 5(14)(15)(16), 15(8)(11), 318(b), 322(e), 903(e)(2), 904(d), 905(c), 907(h), 917(f), 1021(f).

An example is 49 U.S.C. 5(2)(b) which requires, for approval of acquisition of a motor carrier by a railroad, a finding that the transaction "will not unduly restrain competition."

> "Applicant is not required to give notice to *competitors* since notice of such filing will be by publication in the Federal Register, as provided in §§ 1.240 and 1.241 of this Chapter." (Emphasis added).

In discussing a procedural matter the Commission said in *Paulmaur Transportation Co. Motor Carrier Application*, 28 M.C.C. 395, 399:

> "Such petition, being akin to a new application, should be served on all carriers by rail, motor, and water, known to applicant, with whose services the operations covered thereby are or will be directly *competitive.*" (Emphasis added).

In every Annual Report for the past twenty years the Commission has discussed at length the "intense competition" between railroads and motor carriers, saying that "motor carriers are strong competitors of the railways." See, for example, the footnote on page 12 of the Statement as to Jurisdiction.

This Court clearly recognized the full meaning of "competitor" in its use of the word in the *Alton* case, 315 U.S. pp. 18-19.

In view of the wide use of the word "competitor" in the Interstate Commerce Act, in the Commission's regulations, decisions, and Annual Reports, and in the decisions of this Court, all for the purpose of expressing a well known factual concept, it is clear that the allegations of paragraph 20 of appellants' complaint (St. as to Juris. pp. 38-39), admitted of course by the motions to dismiss, establish that appellants are parties in interest.

THE *ALTON* CASE CONSIDERED THE VALIDITY OF AN ORDER AUTHORIZING ONLY THE CONTINUANCE OF EXISTING MOTOR CARRIER RIGHTS. IT IS CLEAR AUTHORITY THAT APPELLANTS ARE PARTIES IN INTEREST

In attempting to distinguish the *Alton* case (315 U.S. 15) from this, appellees assert a construction of that case which is wholly at variance (a) with its obvious meaning, (b) with the construction placed upon the case by subsequent decisions of this Court, and (c) with the construction of the case asserted in various briefs and motions to affirm filed in this Court by the Commission.

The *Alton* case was discussed in our Statement as to Jurisdiction, pages 10-14. The significance of appellees' treatment of it in their motions is the following. Despite the plain fact that the *Alton* case involved only "grandfather" rights, that is, the continuance of *existing* operations, appellees assert that the case involved a grant of *new* motor carrier authority; whereas, they say, the instant order authorized only continuance of existing operations. Appellees apparently led the District Court into the same error, since the District Court said in respect to the *Alton* case (St. as to Juris. p. 23; 130 F. Supp. pp. 78-79) that "the order of the Commission directly affected the transportation situation by granting *new operating rights* which threatened the railroads' traffic". (Emphasis is District Court's).

The Commission's motion to affirm states in part in respect to the *Alton* case (p. 12):

> "Thus, the order in the *Alton* case was entered under section 206(a) of the Act, and involved a specific grant of authority which had the effect of enabling the applicant to expand its operations greatly beyond the limited points it was then serving."

The other moving appellees make the same assertion. (p. 6).

Such a construction of the *Alton* case is totally erroneous. The truth is that the *Alton* case has been the outstanding case, the landmark case, cited by this Court on the proposition that authority granted under the "grandfather" clause must be so limited as to assure no more than "substantial parity between future operations and prior *bona fide* operations." That phrase first appeared in the *Alton* case, 315 U.S. p. 22. Since then it has been quoted with the *Alton* case citation in at least five of the Court's opinions.[2] An example of its use is the following from *Noble* v. *United States*, 319 U.S. 88, 92:

> "If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior *bona fide* operations' which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U.S. 15, 22) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935."

In *Crescent Express Lines* v. *United States*, 320 U.S. 401, the Commission said in its motion to affirm (pp. 6-7):

> "Under this language the Commission can and must attach limitations, whether geographic or otherwise, to insure the 'substantial parity between future oper-

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[2] *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 481; *Noble* v. *United States*, 319 U.S. 88, 92; *Crescent Express Lines* v. *United States*, 320 U.S. 401, 409; *Barrett Line* v. *United States*, 326 U.S. 179, 193; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 448-449.

> ations and prior *bona fide* operations' which the 'grandfather' clause contemplates. *Alton R. Co.* v. *United States,* 315 U.S. 15, 22; * * *"

The Commission stated the same position in its motions to affirm and briefs in the *Noble* and *Barrett Line* cases cited in footnote 2.

Moreover, in its brief filed in this Court in the *Alton* case (p. 33) the Commission urged that the railroads were not parties in interest *because the case involved only the continuance of existing authority and not a grant of new authority.* The Commission is now attempting to put precisely the opposite construction on the *Alton* case: That it is not in point in the instant case because it involved a grant of new authority and not just the continuance of existing authority.

Obviously, the *Alton* case involved only the continuance of "grandfather" authority. It did not countenance the grant of new authority in a "grandfather" case. That is entirely clear from the opinion alone. Its holding has been emphasized by its citation (footnote 2) as the leading authority that the "grandfather" clause must be scrupulously administered to avoid the granting of new authority.

Thus the *Alton* is direct authority that appellants are parties in interest in the instant case, as pointed out in our Statement as to Jurisdiction, pages 10-14. Appellees' attempts to distinguish the *Alton* case from the instant case are utterly lacking in validity; they only emphasize the total want of merit in appellees' contentions.

The cases cited in appellees' motions which have held that various parties were not parties in interest entitled to sue are not in point in this case. Not one of such cases involved the status of a competing carrier as a plaintiff.

On the other hand, in every case, so far as we can find, where the question has come before this Court it has been held that a regulated agency is a party in interest entitled to maintain a suit to review an order of the regulatory commission granting rights to a competitor. Appellees have not cited any cases holding the contrary. The principal cases are cited in our Statement as to Jurisdiction.

Baltimore & Ohio Railroad Co. v. *United States,* 264 U.S. 258, holds that an order made under section 5(2), as in the instant case, is subject to review in a suit by a competitor. The *Alton* case (315 U.S. 15) adds to that the holding that railroads are parties in interest in a suit challenging the validity of an order affecting competing motor carriers. Appellees have failed to state any valid reasons why appellants are not parties in interest.

Conclusion

It is clear that appellants are parties in interest under the allegations of their complaint. Appellees' motions to affirm should be denied and the Court should note probable jurisdiction.

Respectfully submitted,

Joseph H. Hays
Amos M. Mathews
280 Union Station Building
Chicago 6, Illinois
Attorneys for Appellants

A. E. Schoenbeck
James W. Nisbet
Carl Helmetag, Jr.
Eugene E. Anderson, Jr.
J. Raymond Clark
Of Counsel for Appellants

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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; AND OTHERS,
Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C. & R. TRANS., INC.; AND OTHERS,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division

APPELLANTS' PETITION FOR REHEARING

JOSEPH H. HAYS,
AMOS M. MATHEWS,
280 Union Station Building,
Chicago 6, Illinois,
Attorneys for Appellants.

A. E. SCHOENBECK,
JAMES W. NISBET,
CARL HELMETAG, JR.,
EUGENE E. ANDERSON, JR.,
J. RAYMOND CLARK,
Of Counsel for Appellants.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 400

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; AND OTHERS,

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UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; C. & R. TRANS., INC.; AND OTHERS,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division

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APPELLANTS' PETITION FOR REHEARING

Appellants respectfully petition the Court for a rehearing of the judgment herein, whereby the Court granted the motions to affirm and affirmed the judgment of the District Court, upon the following grounds:

1.

The Court's judgment leaves in full effect in the District Court's opinion a statement, necessary for the District Court's decision, which is in direct conflict with five decisions of this Court. The point of conflict and the consequences are of major importance.

As the basis for distinguishing the instant case from *Alton Railroad Co.* v. *United States,* 315 U. S. 15, the District Court said in respect to the Commission's order in the *Alton* case (130 F. Supp. pp. 78-79; Statement as to Jurisdiction p. 23):

> "* * * the order of the Commission directly affected the transportation situation by granting *new operating rights,* which threatened the railroads' traffic. In the present order the railroads are not threatened with any new competition from new operating rights which they have not been subjected to in the past." (Emphasis is District Court's.)

This construction of the *Alton* case is wholly at odds with the plain holding in the *Alton* case, which had to do only with the confirmation of *grandfather,* that is, *existing,* not new, operating rights. Moreover, the *Alton* case has been the one case regularly cited by this Court for precisely the opposite of what the District Court said about it. Thus the *Alton* case was cited for authority that "grandfather" motor carrier rights must be so limited as to assure no more than "substantial parity between future operations and prior *bona fide* operations" in *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 481; *Noble* v. *United States,* 319 U.S. 88, 92; *Crescent Express Lines* v. *United States,* 320 U.S. 401, 409; and *Barrett Line* v. *United States,* 326 U.S. 179, 193.

The District Court failed to follow the above-cited decisions of this Court, and made that failure an indispensable part of its decision. Now this Court, without opinion, affirms the failure of the District Court to follow this Court's decisions.

2.

The Court's judgment upsets a rule that has been followed and depended upon by counsel ever since the decision of the *Alton* case in 1942, a rule relied upon in the instant

case. The *Alton* case (315 U.S. 15, 19-20) holds that the allegations of paragraph 20 of appellants' complaint (Statement as to Jurisdiction p. 38) are sufficient to establish the status of party in interest. For the proof as to interest in the *Alton* case was exactly that stated in paragraph 20, and paragraph 20 was copied from the proof in the *Alton* case. Surely counsel ought to be able to rely upon the stability of a decision of this Court on such an important matter of procedure, particularly a decision that has been cited with approval so often by this Court.

3.

On the plain record the Court permits Fruehauf Trailer Company, already in control of Denver-Chicago Trucking Company with coast to coast rights, to acquire in this proceeding control of several other large motor carriers without complying with section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2) It does this by holding that the only parties protesting such a violation of section 5(2) are not parties in interest. It is impossible to understand how there could be more legally interested parties than railroads competing for traffic with Denver-Chicago and with the other large motor carriers here involved that are all now by the Commission's unlawful order placed under common control.

Respectfully submitted,

JOSEPH H. HAYS,
AMOS M. MATHEWS,
280 Union Station Building,
Chicago 6, Illinois,
Attorneys for Appellants.

A. E. SCHOENBECK,
JAMES W. NISBET,
CARL HELMETAG, JR.,
EUGENE E. ANDERSON, JR.,
J. RAYMOND CLARK,
Of Counsel for Appellants.

Certificate of Counsel

I, Amos M. Mathews, counsel for the appellants, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

AMOS M. MATHEWS

No. 400. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE DOUGLAS would note probable jurisdiction and set the case for argument. *Joseph H. Hays, Amos M. Mathews* and *Carl Helmetag, Jr.* for appellants. *Robert W. Ginnane* and *Isaac K. Hay* for the Interstate Commerce Commission, and *Floyd F. Shields, Ernest L. Rushmer* and *Arthur D. Condon* for the Fruehauf Trailer Co. et al., appellees. Reported below: 130 F. Supp. 76.